

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

Date: July 10, 1997

Case No.: 95 INA 466

In the Matter of:

WORLD WIDE DRAPERY FABRIC,
Employer,

on behalf of

RIO D. DEL ROSARIO,
Alien

Appearance: D. E. Korenberg, Esq., of Encino, California

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Rio Del Rosario (Alien) by World Wide Drapery Fabric (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On August 16, 1993, the Employer, World Wide Drapery Fabric, filed for labor certification on behalf of the Alien, Rio D. Del Rosario, to fill the position of "Budget Analyst." AF 127. The job requirements were a baccalaureate degree in accounting or marketing and three years of experience in the job offered or as a supervisor of a marketing department. Also required were (1) experience using Microsoft Word 5.1., (2) the taking of an accounting test on everyday operations of business, and (3) a test on Microsoft Word 5.1.

Notice of Findings. On October 13, 1994, the CO issued his Notice of Findings (NOF). (AF 18). The CO advised that he would deny certification, subject to Employer's rebuttal of the defects reported in the NOF: (1) The Employer failed to complete the application for labor certification; (2) there were unlawful terms or conditions of employment; (3) the employer's alternative requirements and special requirements were unduly restrictive; (4) the Alien was qualified; and (5) U.S. workers had been rejected on grounds other than job-related reasons. AF 19.

The Employer was instructed to take specific corrective actions: (1) submitting an amendment documenting the Alien's employment for the three years before the filing of the application, including copies of the W-2 forms reporting wages paid to the Alien from 1992 and 1993; and (2) justifying the requirements considered by the CO to be restrictive, or in the alternative (a) deleting those requirements, or (b) establishing that the requirements were not restrictive. The CO explained that the restrictive requirements were the specification of three years as the supervisor of a marketing department as the only alternative experience requirement; marketing as the only degree major alternative to accounting at the baccalaureate level; and the need for prior experience using Microsoft Word 5.1, and the test for facility in that software that was to be given as part of the job interview.

The CO pointed out that the job of "budget analyst" is classified in the Dictionary of Occupational Titles (DOT) as budget accountant, and that the alternative requirement of three years' experience as a supervisor in marketing appeared to be tailored to the background of the Alien, who had that experience, while there did not appear to be any reason that this experience would specifically be better qualifying than many other types of experience in business. The requirement, therefore, excluded U.

S. workers who might have a wide array of other business and management experience.² The CO pointed out that marketing as the only alternative to accounting as the degree major also excluded U. S. workers with bachelor's degrees in business related fields which do not specify that either marketing or accounting was the major within the degree program.

For these reasons the Employer was advised that, if it agreed to amend the restrictive requirement, the following would be acceptable: "Bachelor or equivalent, business related field." Moreover, the CO pointed out that the Alien would not be qualified, as she did not appear to have the three years' experience in the job offered unless the Employer justified the alternate requirement of three years' experience as a supervisor of a marketing department, or broadened the experience requirement.

The CO questioned the requirement for knowledge in Microsoft Word 5.1, as an applicant with word processing experience could learn the new program quickly. Employer was directed to obtain information from the manufacturer or product support personnel specifically to provide authoritative evidence as to the length of time required for an individual who is experienced in using other word processing programs to be expected to be able to work using Microsoft Word 5.1. Employer was warned that, if only a brief amount of time was necessary, then the requirement of specific experience in Microsoft Word 5.1 was unduly restrictive.

Employer was also requested to submit documentation showing with specificity the reasons U. S. workers Corrales, Ordinario and Anieze were rejected. The CO found Mr. Corrales to be qualified because he had a B.S. degree in accounting and his resume showed about eight years of experience in a position which required preparing marketing reports and preparing an annual budget. Mr. Ordinario had a B.A. degree in accounting, and

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor. 160.162-026, **ACCOUNTANT, BUDGET** (profess. & kin.) Applies principles of accounting to analyze past and present financial operations and estimates future revenues and expenditures to prepare budget: Analyzes records or present and past operations, trends and costs, estimated and realized revenues, administrative commitments, and obligations incurred to project future revenues and expenses, using computer. Documents revenues and expenditures expected and submits to management. Maintains budgeting systems which provide control of expenditures made to carry out activities, such as advertising and marketing, production, maintenance, or to project activities, such as construction of buildings. Advises management on matters, such as effective use of resources and assumptions underlying budget forecasts. Interprets budgets to management. May develop and install manual or computer-based budgeting system. May assist in financial analysis of legislative projects to develop capital improvement budget and be designated Program Analyst (government ser.) May assist communities to develop budget and efficient use of funds and be designated Public Finance Specialist (government ser.)

experience working for several companies as an accountant, as well as experience in Microsoft Word and other word processing packages. Ms. Anieze had an M.B.A. degree, two years' experience in the job offered as a budget analyst and five years of experience as an accounting manager and accounting supervisor.

Rebuttal. Employer's rebuttal, dated December 6, 1994, consisted of a letter from the Employer and from the Employer's attorney. AF 29. With regard to the job requirements' being unduly restrictive, Employer contended that the alternatives "reflected the employer's minimum needs for any worker to do the job and not simply the alien's background." Employer argued that the alternative experience requirement as a supervisor of marketing "was entirely appropriate," and did not restrict the job market, but increased the pool of applicants, instead. The Employer said that the Microsoft Word 5.1 requirement "is significant and not simply a brief training." Employer also argued that it did not have time to train an analyst in its computer program. Therefore, according to Employer, "the budget analyst must be computer literate."

As to the rejected U. S. applicants, the Employer argued that Mr. Corrales was rejected after a careful review of his resume. Employer said that, while he had a degree in accounting and was experienced in preparing market reports, he lacked entirely "the higher level skills and experience required for the job." Mr. Corrales' resume showed no experience in a higher level position that included making recommendations to support company policy or any skills coordinating policy with an accounting department, said the Employer.

Employer said Mr. Ordinario was sent a certified letter expressing interest in his job application, and he was told to call the Employer. Mr. Ordinario did telephone, was put on hold, and was advised Employer was on another call and might continue to be so occupied for a while. He was requested to call back and to leave a telephone number. Mr. Ordinario refused and hung up, according to the Employer. The Employer argued that, because Mr. Ordinario was sent a letter of interest and every effort was made to speak with him, "he refused our efforts, and we had not choice because he rejected us."

Ms. Anieze was sent a letter of interest by certified mail, which was returned to Employer, however. Employer telephoned her on July 7th, only to reach an answering machine. While Employer left a message, it never had a response from Ms. Anieze. For this reason, the Employer argued, Ms. Anieze was unavailable to be contacted or interviewed.

Final Determination. By the CO's Final Determination (FD) of February 13, 1995, certification was denied due to Employer's

failure to rebut two of the findings made in the NOF. AF 68. The CO denied certification because the job requirements appeared to be unduly restrictive and because U. S. workers appeared to have been rejected unlawfully.

The CO found the Employer's rebuttal unpersuasive because Employer had failed to explain why three years of experience as a supervisor in marketing met the test of business necessity where other business or management experience did not. Although the experience requirement was broadened to the extent necessary to include the Alien's experience, all other experience remained excluded, which precluded the referral of otherwise qualified U. S. workers in violation of 20 CFR § 656.21(b)(2)(I)(A). In addition, the Employer failed to show why marketing was the only acceptable alternative to accounting under the educational criteria.

The CO found that Employer failed to show why the experience requirement in Microsoft Word 5.1 and the test to be given in Microsoft Word 5.1 was reasonable, as it failed to show how a budget accountant with other word processing experience could not quickly begin using Microsoft Word 5.1 with a minimum of delay. The CO rejected the Employer's argument that a budget analyst must be computer literate as unresponsive to the NOF, since the CO never questioned that requirement. On the other hand, the Employer failed to present evidence to show that more than a brief orientation would be required to permit the worker to begin using Microsoft Word 5.1, if the candidate already had word processing experience.

The CO concluded that the letter sent to Mr. Corrales was discouraging because it advised him that, based on his resume, he was not qualified for the job, and it invited him to contact the Employer only if he had evidence to the contrary. For this reason, said the CO, a good faith effort was not made to recruit this U. S. worker. The CO rejected as unacceptable Employer's claim that Mr. Corrales' resume showed neither experience in making recommendations to support company policy nor skills in coordinating policy with an accounting department, since the ETA 750 A did not state that experience in each of the job duties was required.

Employer's rebuttal regarding its treatment of Mr. Ordinario was also unpersuasive, since the only letter of record that the Employer sent him was signed by Mr. Ordinario as received on July 5, 1994, before the date of the telephone call Employer alleged. The CO concluded for this reason that there was no evidence that the Employer attempted to reach Mr. Ordinario after the telephone call. The CO also found the details of that telephone call to be unclear. There was insufficient evidence to show that he refused to give a telephone number or deliberately hung up on Employer. In addition, the Employer failed to call back this applicant,

whose telephone number was supplied in the job application.

Appeal. The Employer requested review of the CO's denial of certification on March 21, 1995. AF 01. Employer reiterated its arguments as noted above, claiming further that it had not been given adequate notice of the evidence required by the CO to correct the deficiencies noted regarding the details of the telephone conversation it had with Mr. Ordinario, and advising that the evidence requested by the CO as to training in Microsoft Word 5.1 was impossible to obtain. "Therefore, when the Employer responded to the NOF, he used his own experience and judgment as the owner of the business and as one who understands the needs of his company, the amount of time, or lack thereof, to train anyone and the necessity of the skill for the job." Employer said it telephoned Microsoft Word to find out whether or not evidence could be obtained from the manufacturer of this software, and Employer said it learned that Microsoft Word does not offer training courses in the subject and therefore could not provide the information the CO requested. AF 05-06.

DISCUSSION

20 CFR § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Thus, an employer cannot use requirements that are not normal for the occupation or not included in the Dictionary of Occupational Titles (DOT), unless the employer establishes business necessity for that requirement. Where an employer cannot document that the job requirement is normal for the occupation or is included in the DOT job description, 20 CFR § 656.21(b)(2) requires employer to establish its business necessity for that requirement. Where an employer requires knowledge of or familiarity with its own system or procedure, it must prove that knowledge or familiarity with similar systems of procedures, if any exist, is not sufficient for performance of the job. **Harry's T.V. & Audio Service, Co.**, 88 INA 265 (Oct. 30, 1991).

This Employer was directed to provide evidence to establish that more than a brief training period would be required for a computer literate person to learn Microsoft Word 5.1. Employer did not even address this request in its rebuttal, in which the Employer made no mention of any efforts to obtain the information from the manufacturer or from the product support personnel as requested by the CO.

The Employer's appeal demonstrates that the Employer did not attempt to obtain such information until after the CO issued the FD. Rebuttal evidence submitted after the issuance of the Final Determination along with the request for review is not part of the record and cannot be considered on appeal. **Memorial Granite**, 94 INA 066 (Dec. 23, 1994). Consequently, evidence first sub-

mitted with the request for review may not be considered by the Board in this case. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992).

Based on the record before the CO, it is apparent that Employer failed to establish that experience in Microsoft Word 5.1 is a business necessity. In **County of Fauquier, Dept. of Community Development**, 93 INA 540 (Dec. 21, 1994), certification was denied when the Board rejected the Employer's assertion that the U. S. applicant could not become proficient in Microsoft Word with minimal training, concluding that this representation was unsupported by fact. In this case, the Employer made similar arguments, contending that "there is simply no time to train someone," and claiming that it could not verify how long it would take to train a person already computer literate to use Microsoft Word 5.1. The assertions stated in the Employer's rebuttal are vague and unsupported, and for this reason they were given minimal weight in arriving at a conclusion in this matter. **Analysts International Corp.**, 90 INA 387 (July 30, 1991).

It is well established that an employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification. **John Hancock Financial Services**, 92 INA 131 (June 4, 1992). The record before the CO in this case indicates that Employer failed to submit material documentation that the CO reasonably requested, and that the Employer did not produce any other documentation to prove that its requirement of experience in Microsoft Word 5.1 was a business necessity. For these reasons, we find that certification was properly denied by the Certifying Officer, and it is unnecessary to address the remaining issues.

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

Case No.: 95 INA 466

WORLD WIDE DRAPERY FABRIC, Employer,
RIO D. DEL ROSARIO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT
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Holmes	:	:	:	:
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Thank you,

Judge Neusner

Date: June 23, 1997